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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

ANN POSTAG, Individually and as
Trustee, etc.,

Plaintiff and Appellant,

v.

LOIS BOGGS,

Defendant and Respondent.

A134138

(Alameda County
Super. Ct. No. RG09454220)

In this appeal, appellant Ann Postag (Postag), individually and as trustee of the Bette B. Postag Trust, seeks a remand to the trial court for additional damages to adequately compensate for emotional distress and the reduction in the market value of her home. We affirm.

I. BACKGROUND

Postag and respondent Lois Boggs live on Presley Way in the Rockridge District of Oakland, across the street and a few houses apart from one another. Helene Miller lives next door to Postag.

In October 2003 Boggs parked her truck in front of Postag's house. Postag asked Boggs to move the truck but she refused. Postag asked "Why not?" and Boggs responded, "Well, you know what you did." After the truck had been there for about two weeks, Postag asked Ellen Koch, Boggs's domestic partner, to intervene. Koch said the truck would be removed the next day—it was—and told Postag to call her if there were

any further incidents. Postag learned through others that Boggs believed Postag had reported her for blight.

Around this time Postag began keeping an “harassment log” detailing incidents occurring on Presley Way involving neighbor Boggs. Incidents recorded in the 16-page log included leaving furniture on her property; putting campaign signs on her property and car; putting a sticky, smelly liquid on the porch and other areas and food waste and debris on the lawn; and spreading feces on the door handle of her car and her door knob. Many incidents occurred “under the cover of darkness.”

In late 2007 Postag purchased and installed a surveillance camera to monitor nighttime incidents. She spent over 1,300 hours watching videotapes; at trial she presented less than 15 minutes of relevant footage.

During this time Postag never approached Koch again, never asked Boggs to stop the offending behavior although she was the prime suspect, and never contacted the police or the district attorney.

Postag sued Boggs in May 2009 for trespass and nuisance.¹ Before Boggs retained an attorney she sent a letter of apology to Postag, admitting many of the offending acts, as well as a letter seeking reconciliation. She also left a bag of plums on Postag’s doormat.

Prior to the commencement of trial, the court issued rulings on defendants’ motions in limine, including a ruling that Postag would be limited to allegations set forth in the complaint, and noting that she never requested leave to amend to allege additional instances of trespass, nuisance, and damages. Therefore, the court limited the scope of trial to certain specified incidents and related evidence.

¹ In December 2009, Postag named Helene Miller as a Doe defendant on allegations that Boggs was acting as Miller’s agent and the two were coconspirators for each of the alleged acts. The court granted Miller’s motion for judgment pursuant to Code of Civil Procedure section 631.8.

In Boggs's opening statement, counsel admitted 24 of the allegations and indicated Boggs was remorseful and embarrassed by her own conduct. Thus the issue at trial was the amount of damage Postag sustained.

At trial Postag testified that during the timeframe between 2005-2007, the value of her house was "[c]lose to \$1.2 million . . . based on the quality of the property, location of the property, and the superior finishes." She said she formed the intent to sell the property, but never listed it because of the "activities that were happening with Ms. Boggs in the middle of the night, as well as Ms. Miller hadn't complied with all of the terms of the earlier litigation with her,^[2] and I was uncomfortable putting the house on the market for those reasons." Postag posited that the value of her house declined to \$875,000 at the end of 2007 and was worth about \$775,000 in August 2011. She sought damages based on the diminution in value that occurred because she was precluded from selling at the top of the market in 2007 due to "the ongoing need to make the disclosure about Ms. Boggs' activity and the fact that Miller is still unresolved."

Boggs's expert, Alison Teeman, is a licensed general appraiser with a focus on residential real property. She testified that the value of the property had declined between \$95,000 to \$100,000 from the peak of the market to the time of trial, based on market trends. Teeman has appraised many properties where the issue of neighbor disagreement arises. She explained that whether a dispute impacts the value of a property depends on "if it's going to be an ongoing problem." Where it is the seller of the property who is complaining, "it seems likely that with that sale the problem will cease to exist." Teeman did not think the acts of harassment involved in this case would have a significant impact on the final selling price of the property. In fact, the effect of the dispute would be of a magnitude within the margin of error inherent in the appraisal function.

Postag also testified that she suffered emotional distress, including upset stomach, which got to the point "where it was every morning I was waking up with dreadedness

² Postag sued Miller twice.

[sic] not knowing what I was going to find and what I was going to have to clean up.” As well Postag experienced anxiety and anger, and was “very hurt that these things were happening to me.” There was an ongoing level of stress and apprehension; the stress affected her right hand such that it was cracked, swollen, and bleeding. The feces incident was upsetting and “ill-making.” Postag did not claim any past or future medical expenses, nor did she see a therapist, healthcare practitioner, or professional, or life coach because of the acts of Boggs.

The trial court ruled that all claims for trespass and nuisance against Boggs based on acts occurring prior to May 26, 2006, were barred by the three-year statute of limitations for trespass and nuisance. It further concluded that Postag did not sustain her legal obligation to mitigate damages, noting that she “did nothing to stop Boggs other than one successful telephone call to [Koch].” The court entered judgment in favor of Postag in the amount of \$1,500 in actual damages, \$1,500 for annoyance and emotional distress, and \$3,000 for malice. The actual damages award was based on “the totality of the circumstances,” the amount tied to what would be reasonable to compensate a laborer to clean up the various messes. With respect to Postag’s claim that Boggs’s actions caused her property to lose value, the court found she “never made any affirmative steps to sell her Home and her opinions as to the potential loss were not credible and based upon speculation. Further, the evidence was persuasive that in the Rockridge neighborhood real estate market, the *personal* conflict between Postag and Boggs would not have had a significant impact on a potential buyer. No evidence was proffered that other neighbors were experiencing the same issue with Boggs.”

As to emotional distress and punitive damages,³ the court concluded that while Postag did not mitigate, that did not excuse Boggs for her actions. Therefore, Postag should be awarded a reasonable amount to compensate her for the annoyance and emotional distress suffered and to deter Boggs. Nonetheless, the court viewed Postag’s demand as “inflated,” revealing “that greed, more than distress or outrage, fueled this

³ Postag apparently sought \$60,000 in such damages.

litigation. Had significant emotional distress been at the core of this dispute, a reasonable person would have moved sooner to file suit, to seek help from the police or the district attorney or from the Court's expedited and routine civil harassment calendar. Had Plaintiff been motivated by anything other than anger and greed and the desire to punish, relief could have come years ago. . . . [T]his court will not be used as a mechanism to line one's pockets with cash because of the childish, pathetic conduct of an infirmed neighbor."

Finally, the court issued a restraining order to stop harassment protecting Postag from further contact with Boggs for a period of three years.

This appeal followed.

II. DISCUSSION

As Postag remarks at the outset, she appeals the judgment only insofar as it awarded her insufficient damages. However, to the extent she challenges the sufficiency of the evidence as to the emotional distress and actual damages awards, these claims are waived for failure to move for a new trial on the ground that damages were inadequate. A litigant may not raise a claim of inadequate or excessive damages on appeal unless the error was first urged in a timely motion for new trial. (Code Civ. Proc., § 657, subd. (5); *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759.) "The theory is that trial courts are in a better position than appellate courts to resolve disputes over the proper amount of damages. [Citations.] 'A failure to timely move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court. [Citation.] The power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court.' " (*Ibid.*)

Where, as here, the court awards damages in a cause tried without jury, on a motion for new trial the court may "change or add to the statement of decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set

aside the statement of decision and judgment and reopen the case for further proceedings” (Code Civ. Proc., § 662.)

Failure to move for a new trial, however, does not prevent a party from asserting error in the trial of issues related to damages such as erroneous evidentiary rulings, instructional errors, or the failure to apply the correct measure of damages. (*Greenwich S.F., LLC v. Wong, supra*, 190 Cal.App.4th at p. 759.)

Postag did not move for a new trial below on the matter of inadequate damages, and hence she cannot complain of the same on appeal.

A. Emotional Distress Damages; Mitigation

Postag’s assertion that the emotional damages award was inadequate is based largely on the evidence adduced at trial and the inferences therefrom, and thus should have been addressed in a motion for new trial. Clearly, the trial court doubted Postag’s credibility on the issue of the extent of emotional distress suffered, questioning Postag’s motives and delay in seeking relief. The trial court is the proper venue to resolve disputes about such credibility determinations.

Nonetheless, whether the doctrine of mitigation was misapplied raises a legal question which is properly before this court. The trial court cited *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, in support of its ruling that Postag did not sustain her legal obligation to mitigate damages. There, the Bezeneks’ teenage sons made unauthorized use of the carrier’s access and authorization codes to make long distance phone calls without paying for them. The carrier quickly learned of the hacking and thereafter identified the Bezeneks’ home as the source. However, it never contacted or complained to the Bezeneks after the hacking episode and instead filed suit for damages. The teenagers again hacked the system and overburdened it such that some subscribers were denied access to phone lines. (*Id.* at p. 1564.) At trial, the father testified that he would have stopped the hacking immediately had he been advised of his children’s activities. Nevertheless the trial court awarded damages for both events. Reversing, the reviewing court held the Bezeneks were not liable for damages related to the second

incident, because the simple expedient act of picking up the telephone and calling the family or sending a letter would have averted the second episode. (*Id.* at pp. 1568-1569.)

In the case at hand, Boggs's partner, Koch, orchestrated, upon Postag's request, the moving of Boggs's truck in 2003 and told Postag to call her if there were further difficulties with Boggs. This was evidence of a possible course of mitigation which Postag did not pursue. Instead, for nearly six years she kept a painstaking journal of accumulating incidents, purchased a video system and watched hundreds of hours of videotapes, and then brought suit. The doctrine of mitigation in the context of this dispute tasks Postag with making some reasonable effort to protect her own interest in the quiet enjoyment of her home and property, such as a phone call to Boggs, Koch, or to a public agency. This she failed to do. The trial court did not misapply the doctrine of mitigation.

It is also apparent that while the trial court did charge Postag with failure to mitigate, in this context the failure to mitigate reflected the trial court's distrust of Postag's claim to have suffered significant emotional distress. Again, this is a credibility issue. The trial court, viewing the totality of circumstances, determined that the demand for emotional distress damages was inflated, revealing greed, anger, and the desire to punish more than distress or outrage. In the last analysis, the trial court's assessment of damages was based on its view of the evidence and in particular the credibility of Postag. The power to weigh evidence and resolve credibility issues is vested in the trial court, not the reviewing court.

B. Diminution in Value of Postag's Home

Postag is adamant that the trial court erred in failing to award her approximately \$425,000, representing the reduction in value of her home which she ascribes to "the ongoing but intermittent harassment of Boggs." She argues that one is not required to sell a house or even list it for sale in order to recover damages under these circumstances. Postag misses the point. Again, these matters go to credibility. The court was not persuaded that Postag intended to sell her home, noting that she took *no* affirmative steps in that direction, and her opinions as to potential loss were not credible and based on

speculation. These matters should have been, but were not, addressed in a motion for new trial.

In any event, the trial court further concluded, based on the evidence, that in the Rockridge market, the personal conflict between Postag and Boggs would not have a significant effect on a potential buyer. In other words, the court weighed and gave credence to Teeman's expert testimony (described above) on the issue of proximate cause, another example of a factual matter that should have been resolved through a motion for new trial.

C. Amendment to Conform to Proof

In her opening brief, Postag comments that the trial court "improperly" limited her damages to items identified in the complaint, rather than allowing the pleadings to be conformed to proof after presentation of evidence. Prior to trial the court did limit Postag to the allegations in the complaint, noting that Postag never requested leave to allege additional instances of trespass, nuisance, and damages. Nothing in the record indicates that Postag objected to this ruling or proffered any additional such instances at that time.⁴ In any event, Postag has provided no details as to how she would have amended the pleadings and thus has failed to carry her burden of affirmatively showing reversible error on this point. (*In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278; see also *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

III. DISPOSITION

We affirm the judgment.

⁴ At the close of trial, counsel for Postag did move to conform the pleadings to the proof, specifically requesting to add a libel cause of action based on a written petition that was circulated in the neighborhood in July 2006 protesting Postag's photographing neighborhood people and vehicles. Although the court denied the motion, it specifically found that circulating the petition did not constitute a nuisance or trespass, and the attempt to add a defamation cause of action was barred by the one-year statute of limitations. This ruling was correct. (Code Civ. Proc., § 340, subd. (c).) Moreover, the court noted there was significant credible evidence that Postag was taking pictures of people and vehicles in the neighborhood.

Reardon, J.

We concur:

Ruvolo, P.J.

Rivera, J.